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ASSISTANT ATTORNEY GENERAL
LEGISLATIVE AFFAIRS

Department of Justice
Washington, D.C. 20530

MAY 3 1978

Honorable Howard M. Metzenbaum
Chairman, Subcommittee on Citizens &
Shareholders Rights & Remedies
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

On April 7th we supplied your Subcommittee with a draft disciplinary proceeding amendment to accompany S. 2117, the Department's proposed amendments to the Federal Tort Claims Act.

We have redrafted that disciplinary proceeding to place it in a more readable and more understandable form. The only substantive changes are found in proposed subsections 7803(a), (b), and (c), and these principally concern the scope of administrative review of the employing agency's disciplinary proceeding.

We have also marked up S. 2117 to incorporate the amendments which we forwarded to your Subcommittee on March 30th. The only new substantive change in this redraft is a provision, found in section 11, which allows certain plaintiffs to elect to have a jury trial under present law rather than a bench trial under the new statute.

Copies of both redrafts are enclosed.

Sincerely,

(Signed) Patricia M. Wald

Patricia M. Wald
Assistant Attorney General

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Title 5, United States Code, is amended by adding a new chapter 78 containing new sections 7801, 7802, 7803, 7804, 7805, 7806 and 7807 as follows:

"Section 7801. Definitions

For the purposes of this chapter:

(1) "Person" means any natural person subject to the Constitution of the United States;

(2) "Federal agency" means a Federal agency, as defined in section 2671 of title 28, United States Code, which employs or employed an "employee" defined in subsection (3) of this section;

(3) "Employee", unless otherwise described, means a present "employee of the Government" as defined in section 2671 of title 28, United States Code; and

(4) "Disciplinary Action" means removal, suspension without pay, demotion, admonishment or reprimand for such cause as will promote the efficiency of the service.

Section 7802. Administrative Inquiries Generally

A person who obtains a monetary recovery from the United States on a claim under section 2675 or section 1346(b) of title 28, United States Code, arising under the Constitution of the United States, may within 30 days thereafter request, as provided herein, an administrative inquiry of the conduct alleged to have given rise to the claim.

Section 7803. Conduct of Employees of the United States

(a) A request under section 7802 for an administrative inquiry with respect to the conduct of an employee of the United States shall be made to the head of the federal agency,

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or his designee, by which the employee is employed.

(b) The inquiry shall be conducted without unnecessary delay. The person requesting the inquiry may submit a statement and, if a hearing is held, appear and give testimony. The agency shall determine whether disciplinary action is warranted and, if so, the appropriate nature and degree of disciplinary action, and the person shall be notified of the action taken by the agency and the reasons therefor.

(c) Within 30 days after notification of the action taken by the agency, the person may request an administrative review thereof by the appropriate individual or body described in section 7805. The individual or body conducting the administrative review shall determine on the record whether the action taken by the agency was reasonable. If it is unable to make the determination because it finds the record inadequate, it may remand to the agency for further proceedings or it may, in its discretion, supplement the record by taking additional evidence. The final decision shall include a statement of findings and a recommendation, which, except as provided by section 7807(d), shall be binding on the agency, with respect to disciplinary action against the employee.

(d) Within 60 days after the issuance of a final decision on an administrative review, the person may petition for review of the decision by a district court of the United States. The court may

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Notwithstanding any other provision of this Act, this chapter shall not apply to any claim or suit arising under the Constitution for tortious conduct which occurred prior to the passage of this Act.

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deny the petition, affirm the decision, or set aside the decision and remand for further proceedings if it finds the decision to be arbitrary or capricious on the basis of its review of the decision, the reasons therefor, and the recommendation with respect to disciplinary action. The court's review shall be held in camera for matters specifically protected from disclosure by statute or executive order if the court determines that in camera review is necessary.

3. Add period after protected. Second portion was discretionary

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Section 7804. Conduct of Former Employees and Presidential Appointees.

(a) A request under section 7802 for an administrative inquiry with respect to the conduct of a former employee of the United States or a present or former appointee of the Presidenti shall be made to the appropriate individual or body described in section 7805.

(b) The individual or body conducting an administrative inquiry under this section shall prepare a written report of the results thereof. Such report shall be served on the person whose conduct is the subject of the inquiry and shall be made public not less than 30 days thereafter, unless public release is enjoined pursuant to subsection (c).

(c) A person whose conduct is the subject of an administrative inquiry under this section may, within 30 days after service upon him of the report of the inquiry, petition a district court of the United States to review the report and enjoin its public release on the grounds that it is arbitrary or capricious.

Section 7805. Individuals and Bodies Conducting Inquiries and Review

An administrative inquiry under section 7804(a) or an administrative review under section 7803(c) shall be conducted by:

(a) The Secretary of Defense, or his designee, with respect to a uniformed member of the Armed Forces as described in section 101(4) of title 10, United States Code;

(b) The Secretary of the Department in which the United States Coast Guard is operating, or his designee, with respect

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(c) The head of an agency with a personnel system under the Foreign Service Act of 1946, as amended (22 U.S.C. 801 et seq.), or his designee, with respect to an officer or employee of the Foreign Service;

(d) The head of an agency with a personnel system under the Public Health Service Acts, as amended (42 U.S.C. 191 et seq.), or designee, with respect to an officer or employee of the Public Health Service;

(e) an individual or body designated by the President with respect to an officer or employee engaged in intelligence activities; or

(f) The Civil Service Commission in any other case.

Section 7806. Regulations.

(a) Within 90 days after enactment of this chapter, the individuals and bodies described in section 7805 shall issue such regulation as are necessary and appropriate for the implmentation of sections 7802-7805.

(b) Regulations issued by the Civil Service Commission under this section shall be approved by the Attorney General. The head of each federal agency subject to the administrative review provisions of section 7803(c) shall comply with such regulations and shall, within 60 days after their effective date, issue rules, regulations and instructions not inconsistent therewith.

(c) The head of each federal agency enumerated in section 101(4) of title 10, United States Code, shall, with respect to uniformed members of the Armed Forces, comply with regulations issued under this section by the Secretary of Defense and shall,

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within 60 days after their effective date, issue rules, regulations and instructions not inconsistent therewith.

(d) The head of each federal agency having officers or employees engaged in intelligence activities shall comply with the regulations issued under this section by the individual or body designated by the President to conduct or review administrative inquiries with respect to such individuals and shall, within 60 days after their effective date, issue rules, regulations and instructions not inconsistent therewith.

Section 7807. Miscellaneous

(a) Nothing in this chapter shall affect the rights of an employee to appeal or to seek review or other means of redress of any disciplinary action taken against him which he would have under other provisions of law. Provided, however, that an employee, who is the subject of a disciplinary action recommended by the Civil Service Commission pursuant to subsection 7803(c), shall not be required by any other provision of law to take an appeal to the Commission prior to seeking judicial review of that action.

(b) An employee who is not entitled under other provisions of law to seek administrative or judicial review of disciplinary action taken against him may, if an administrative review is conducted under section 7803(c), participate in such review and given evidence or testimony if a hearing is held, and, to the extent provided by section 7803(d), may petition for judicial review of a final decision if any disciplinary action recommended under subsection 7803(c) is greater than that proposed by the employing federal agency.

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(c) Nothing in this chapter shall affect the availability of defenses which an employee may raise in any administrative or judicial proceeding.

(d) Nothing in this chapter shall require a federal agency to delay taking disciplinary action against an employee, or empower the Civil Service Commission to reduce the severity of disciplinary action taken by an agency against an employee who would not have a right to seek the Civil Service Commission's review of such action under other provisions of law.

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